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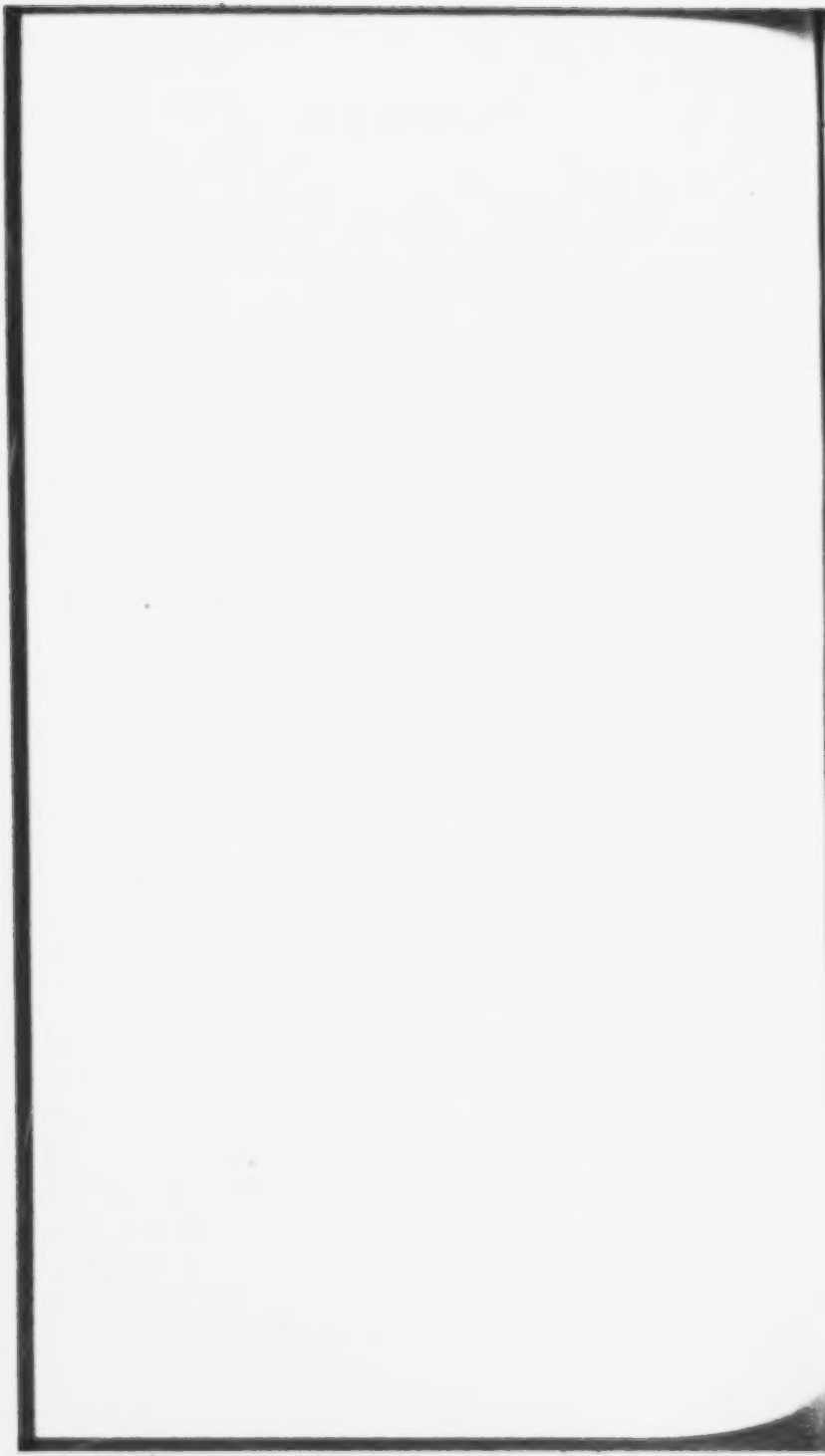

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In the Supreme Court of the United States

October Term, 1969

No. 1501

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,

Petitioner,

vs.

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, a corporation under the laws of Florida,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents, B. Roy Gibson, Jr., and St. Joseph Telephone and Telegraph Company, file this Brief in opposition to Petition of Joseph A. Maloney, d/b/a The Apalachicola Times, seeking Writ of Certiorari to the Supreme Court of Florida, to review the judgment and opinion of that court entered in this cause on January 28, 1970.

JURISDICTION

Petitioner asserts jurisdiction under 28 USC, §1257(3), and Rule 19(1)(a) Supreme Court Rules. Respondents submit at the outset that the opinion or decision of the Supreme Court of Florida which Petitioner seeks to have reviewed, does not qualify under the statute cited (28 USC §1257(3)), which provides in pertinent part for review of "Final judgments or decrees . . .", rendered by the highest court of a state. In this instance, the decision of the Supreme Court of Florida simply required that the cause be remanded for a new trial upon proper instructions (Petitioner's Appendix, p. 8).

The Supreme Court of Florida, in this case, determined consistent with applicable federal decisions, viz *New York Times vs. Sullivan*, (1964) 84 S.Ct. 710, *Curtis Publishing Co. vs. Butts*, (1967), and *Associated Press vs. Walker*, (1967) 87 S.Ct. 1975, that Petitioner Maloney did in fact occupy as a matter of law the position of "public figure", so that the Defendant Respondents in Maloney's libel suit were entitled to the protection of these most recent decisions spelling out the constitutional safeguards applicable to actions for defamation brought by "public officials", or "public figures", as defined in those cases. This finding of the Supreme Court of Florida is not challenged by Petitioner in his Petition for Writ of Certiorari in this cause.

It follows then, that Petitioner seeks review of an opinion or judgment which is not final in any sense, except in its finding or conclusion that Maloney is a "public figure" within the doctrine of the cases cited, and that

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upon new trial the Respondents are entitled to have the case submitted to the jury under proper instructions both with respect to the federal and the state decisions as well.

There has been no final judgment; there has been no effective determination of the litigation; remand for new trial is not "final"; and the requirement of finality applies to review by certiorari. Citation of authority would appear superfluous, in that there are a great number of decisions annotated under 28 USC, §1257, of which the following are representative: *Market St. Ry. Co. vs. Railroad Commission of State of Cal.*, Cal. 1945, 65 S.Ct. 770; *Loeber vs. Schroeder*, Md. 1893, 13 S.Ct. 934; *Gospel Army vs. City of Los Angeles*, Cal. 1947, 67 S.Ct. 1428; *Mills vs. State of Alabama*, 86 S.Ct. 1434.

QUESTIONS PRESENTED

Respondents do not agree that the questions presented in the Petition are properly before this court. Respondents further take issue with the affirmative answers suggested to each of the three questions presented by Petitioner, and submit to the court that, taken in order, the same should be answered as follows: One — the opinion of the Supreme Court of Florida does not decide a federal question of substance in a way not in accord with prior decisions of this court; Two — the opinion does not misinterpret and misapply the decisions in *New York Times vs. Sullivan*, *Curtis Publishing Co. vs. Butts*, supra; and Three — the opinion does not misinterpret and misapply the privileges of the First Amendment and the Fourteenth Amendment, U. S. Constitution, depriving Petitioner of his rights under the Seventh Amendment, U. S. Constitution.

REASONS FOR DENYING THE WRIT

First, Petitioner Maloney concedes before this court (by implication) the correctness of the Supreme Court of Florida characterizing him as a "public figure" within the doctrine of the *New York Times*, *Walker* and *Butts* decisions, supra.

Second, in finding that Maloney was a "public figure", the Florida Supreme Court ruled consistently with the federal decisions, although Petitioner attempts to draw a comparison with the *Butts* case, where punitive damages were awarded and a libel judgment in favor of a "public figure" was allowed to stand. Petitioner's logic, reduced to simplest terms, is simply that in a libel case, if punitive damages are awarded, then whether the Plaintiff is or is not a "public figure", is immaterial. Respondents are confident that this court has not applied such logic as the test for determining whether a libel judgment for damages awarded to a "public figure" can be constitutionally upheld.

There are two further immediate answers to Petitioner's contentions on this point: first, as to Respondent Gibson, *there was no award of punitive damages.* This one fact disposes of the point as to him. Secondly, a reading of the *Butts* and *Walker* decisions does not justify Petitioner's reliance because of the great many factors, both factual and otherwise, that differentiate the cases.

As Respondents view the matter, the case before the court would align more closely in a limited way, with the case of *New York Times vs. Sullivan*, supra. In the case before the court, the trial judge charged the jury that in

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instances of a libel which tends to injure another in or about his business or occupation, "malice may be implied or inferred from the nature of the article or the words written" (Pet. App. p. 13). And while it is true that in a latter portion of the charge, part of which is quoted in a dissenting opinion (Pet. App. p. 15) the trial judge did state that under certain circumstances there would be a "qualified privilege", he did not elaborate upon the effect of such privilege, did not explain to the jury that the implication or inference of malice does not exist in such cases, nor that actual malice must be proved in order to overcome the qualified privilege. The charge fell far short of the requirement that Plaintiff must "affirmatively and expressly" show actual malice in Defendants in order to recover.

Third, there has actually been no denial of a jury trial under the Seventh Amendment because the case has in fact been *remanded for new trial*, with directions for proper jury instructions under both Florida and federal decisions (Pet. App. p. 8).

Fourth, the Justices of even this Honorable Court frequently disagree — at times with great vigor — with respect to the facts, the interpretation of the facts and record of a given case, and upon the law itself. So it is with the Supreme Court of Florida. A majority of the Justices of that court who sat on the case have examined and interpreted the jury charges and the record and found error under both Florida and federal decisions. Petitioner in effect now requests this court to amend the decision and opinion of the majority based upon comments and interpretations of the record found in the opinions of the two dissenting Justices — each of whom, it might be ob-

served, found no basis for regarding the federal decisions as controlling the decision of the Florida Supreme Court (Pet. App. pp. 17, 26).

The law of Florida authorizes the court to determine whether statements, allegedly libellous, are protected by a qualified privilege. *O'Neal vs. Tribune Company*, Fla 1965, 176 So.2d 535; *Abrams vs. Odham*, infra. The Florida Supreme Court found on the record before it that Maloney was a "public figure". This finding is not challenged in the present proceeding. The Florida court's reversal of Petitioner Maloney's judgment means simply that the case must be re-tried, and that on the second time around, the case must be tried with due regard for *New York Times*, *Butts* and *Walker*, supra, as controlling decisions.

Finally, the climate of controversy created by the activities of Petitioner Maloney with his weekly news publication, The Apalachicola Times, prompted the Supreme Court of Florida to find adequate grounds for reversal of the judgment in his favor under the decision of *Abrams vs. Odham*, Fla 1956, 89 So.2d 334, pursuant to which it found the comments by Respondent Gibson "fair comment", on a public matter relating in part to an individual who had by choice "made himself newsworthy and a part of the passing scene" (Pet. App. pp. 5, 8).

CONCLUSION

The court should decline to issue the Writ of Certiorari in this case on jurisdictional grounds. Even if the opinion and decision of the court below were actually "final", there would still be no basis for review because of the essential correctness and proper application of the federal decisions in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, FORD L. THOMPSON, a member of the Bar of the Supreme Court of the United States, hereby certify that a true copy of the foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari was served on Petitioner by mailing copy thereof in duly addressed envelope to Harold Heller of Truett & Watkins, P. O. Box 1814, Tallahassee, Florida, 32302, Attorneys for Petitioner, this 21st day of May, 1970.

Ford L. Thompson

Ford L. Thompson